CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION
MINUTES OF THE MEETING, Public Session

September 10, 2001

Call to order: Chairman Karen Getman called the monthly meeting of the Fair Political Practices Commission (FPPC) to order at 9:55 a.m., at 428 J Street, Eighth Floor, Sacramento, California. In addition to Chairman Getman, Commissioners Sheridan Downey, Thomas Knox, Carol Scott and Gordana Swanson were present.

Item #1. Approval of the Minutes of the July 9, 2001 Commission Meeting.

The minutes of the July 9, 2001 Commission meeting were distributed to the Commission and made available to the public. Commissioner Swanson motioned that the minutes be approved. The motion was seconded by Commissioner Scott. There being no objection, the motion carried.

Item #2. Approval of the Minutes of the August 3, 2001, Commission Meeting.

The minutes of the August 3, 2001 Commission meeting were distributed to the Commission and made available to the public. There being no objection, the minutes were approved.

Item #3. Public Comment.

Chairman Getman announced that General Counsel Luisa Menchaca received a lifetime leadership award from Café de California, a state employee organization.

Item #4. Proposition 34 Regulations: Sections 85304 (Legal Defense Funds) and 85700 (Donor Information - Contribution Return); Adoption of Regulations 18530.4, 18570.

Commission Counsel Scott Tocher explained that under Proposition 34, legal defense funds can be established for legal actions that arise out of campaign activities or the officeholder's duties, and are not subject to contribution limits. He reviewed the Commission's July decisions that the officeholder must establish a separate committee for these funds, and that only one committee may be established regardless of the number of legal actions pending, and that the legal defense fund file quarterly disclosure reports.

Mr. Tocher explained that § 85304(b)(1) allows excess legal defense funds to be spent on campaign debts and officeholder expenses. However, since the legal defense fund is

established outside of the campaign contribution limits, this could allow excess contributions back into a campaign committee. Staff presented two options dealing with this potential loophole, and recommend that the Commission adopt option "a".

Mr. Tocher stated that option "a" would allow legal defense funds to be transferred back into the campaign committee at the close of the legal defense fund, but that it would be subject to the contribution limits and to the method of transfer in §85306. Option "b" would require attribution to actual contributors, which is not possible if there have been any expenditures out of the legal defense fund because it would require an accounting system detailing how each contribution was spent. He suggested that the Commission could consider an attribution system that would attribute some proportion of the transferred funds based on the proportionate amount of money contributed by each contributor.

Mr. Tocher suggested that option "a" would be the easiest for candidates to use, especially since the Commission was considering adopting a system for § 85306.

In response to a question, Mr. Tocher agreed that the fund could be used for all legal matters the committee deals with.

Mr. Tocher explained that monies remaining in the legal defense fund after all legal expenses have been paid would be transferred as if the donor were a new contributor. If the contributor had already reached the contribution limits in that election, then the money could not be transferred into the campaign and those funds would have to be disbursed in accordance with § 85306(b)(2 through 5), or it could be returned to the contributor.

Commissioner Scott suggested that the Commission advise candidates that they may want to set up a legal defense fund in the future, and that they should set up a system that would allow for attribution should there be excess funds after all of their legal expenses have been paid.

Mr. Tocher responded that committees would already be keeping the records for quarterly reporting.

Chairman Getman noted that a fact sheet for legal defense funds would be developed and that information could be included in the fact sheet.

Commissioner Knox asked whether staff was confident that the Commission had the authority to limit the amount of money that is disposed of from a legal fund. He was concerned that § 85304(c), requiring that any remaining legal defense funds be disposed of in accordance with paragraphs 1 through 5, might prohibit the Commission from imposing a dollar limitation on attribution.

Mr. Tocher responded that such a reading of the statute would be inconsistent with the establishment of the contribution limits. He pointed out that, since the legal defense fund statute is with the other contribution limit statutes, he saw no support for the notion that

there could be any exception to those limits beyond those to defray attorney's fees and costs.

Commissioner Downey suggested that the word "discharge" in proposed regulation 18530.4, page 2 line 4, be changed to "disposition."

In response to a question, Mr. Tocher explained that if Decision 1 option "a" is selected, the regulation would read, "(b)(1) through (b)(5)." If option "b" is selected, the regulation would read, "(b)(2) through (b)(5)," and the sentence beginning on page 2, line 5 of the proposed regulation would then be included in the regulation.

Chairman Getman motioned that the Commission approve subdivision (f) to read:

> "Remaining legal defense funds, as defined by subdivision (c) of Government Code section 85304, may be disposed of for the purpose set forth in subdivisions (b)(1) through (b)(5) of Government Code section 89519, except that such disposition is subject to the provisions of Government Code sections 85301-85306 and 2 Cal. Code Regs. Section 18536."

Commissioner Downey seconded the motion.

There being no objection, the motion carried.

Chairman Getman motioned that the Commission adopt regulation 18530.4 with the subdivision (f) that was just approved.

Commissioner Downey seconded the motion.

There being no objection, the motion carried.

Mr. Tocher explained that proposed regulation 18570 dealt with the return of contributions for which insufficient contributor information has been provided by the recipient. He noted that the Commission had already decided that the 60-day period begins to run when the contribution is received, and that the funds must be returned to the donor or the Secretary of State within 60 days. He noted that SB 34 does not require further changes in the proposed regulation.

Mr. Tocher pointed out that subdivision (e) of the proposed regulation describes which campaign statements do not need to be specially amended for late-acquired contributor information.

Mr. Tocher stated that the word "than" on page 1, line 19 of proposed regulation 18570 should be changed to "from."

Mr. Tocher clarified that when a contribution is received and reported as received, then returned to an entity, the return would be reported on the next statement. Contributions

which are received and then returned during the same reporting period are reported as such on the report for that period if the contribution was deposited.

Chairman Getman motioned that regulation 18570 be adopted with the grammatical change previously noted.

Commissioner Knox seconded the motion.

There being no objection, the motion carried.

Item #5. Proposition 34 Regulations: Outstanding Debt (§ 85316) – Adoption of Regulation 18531.6.

Staff Counsel Holly Armstrong stated that § 85321 of SB 34 indirectly affects § 85316, but does not prevent adoption of regulation 18531.6 as proposed. Staff will continue to analyze SB 34 and will bring any necessary amendments to the Commission in the future.

Ms. Armstrong clarified that § 85321 can be interpreted a number of ways, but basically provides that campaigns with debt prior to January 1, 2001 are not subject to the Proposition 34 fundraising limits.

Chairman Getman pointed out that § 85321 codifies that portion of the proposed regulation providing that candidates who had an election prior to January 1, 2001 are not subject to the Proposition 34 limits for fundraising for that election.

Ms. Armstrong noted that staff proposed the following clarifying changes in regulation 18531.6:

- Subsection (a)(1) has the phrase "for contributions made on or after January 1, 2001," clarifying that proposition 73's special election contribution limits do not apply to contributions made on or after January 1, 2001. Contributions over the limits made prior to January 1, 2001 would be violations.

There was no objection from the Commission to this change.

- Subdivision (b)(2) added, "Beginning January 1, 2001, contributions received by any candidate controlled committee formed prior to January 1, 2001, for an election held after January 1, 2001, are subject to the limits of Government Code §§ 85301 and 85302." This subdivision would make it clear that committees formed prior to January 1, 2001 for elections that were to be held after January 1, 2001 and were able to accept contributions above the limits prior to January 1, 2001, would be subject to the limits after January 1, 2001.

There was no objection from the Commission to this change.

Ms. Armstrong explained that Decision 1 of proposed regulation 18531.6 would insert a date certain into the definition of "net debts outstanding." She proposed that the net debt be calculated as of the date of the election.

Chairman Getman questioned how a candidate would pay for legal expenses that may be incurred after the election.

Ms. Armstrong responded that staff could set the date certain to be 30 days after the date of the election to accommodate those potential expenses.

Chairman Getman noted that most expenses incurred after the date of the election are legal expenses. She suggested including language that would keep the date certain but allow for payment of those possible legal expenses.

Lance Olson commented that there might be campaign staff doing the work related to the legal issues after the election, such as watching absentee ballots being counted. He suggested that the wording refer to expenses associated with those activities. He noted that committees would incur expenses associated with audits after the election and would incur expenses related to post-election reports.

Ms. Armstrong noted that closed committees are sometimes audited and that she did not know whether the proposed regulation would affect those audits.

In response to a question, Commissioner Knox stated that the date certain language may not work in the regulation.

Ms. Armstrong noted that enforcement staff supported a date certain because it would make enforcement easier.

Commissioner Downey asked staff to prepare a list of those expenses that might be incurred after the date of the election.

Chairman Getman noted that a member of the audience suggested that those expenses could be incurred up to two years after the date of the election, and that reports would have to be filed as long as the committee is in existence. Contested elections could take six months to a year.

Commissioner Knox suggested that the proposed regulation not include the language "as of the date of the election."

Chairman Getman suggested that the Commission could adopt the regulation without the date certain and then study expenses that come in after the next election to determine whether further changes need to be made.

Trudy Schafer, from the League of Women Voters of California, agreed with the Chairman, but recommended that the Commission not consider a date too far removed from the date of the election, should the Commission decide to include a date certain in the future. Audits and post-election reporting can be budgeted, and she believed that the public does not want campaigns to build up debt. Campaign committees should factor in those expenses that commonly occur in their budgets.

There was no objection from the Commission to deleting the bracketed language in Decision 1.

Ms. Armstrong explained that Decision 2 dealt with whether to include tangible assets in the definition of liquid assets that would be available to pay off debts. She corrected a previous statement, noting that tangible assets were not included in the federal definition of tangible assets. She noted that committees might have some tangible assets of great value, but that there were good reasons to leave it out of the definition. Staff made no recommendation.

Commissioner Downey suggested that tangible assets be left out of the definition.

In response to a question, Ms. Armstrong explained that committees might have assets of great value donated to them. Those assets might be sold to pay for the campaign, or the candidate may decide to keep the item.

Chairman Getman noted that candidates have had paintings donated to them and that there are rules prohibiting the candidate from taking the painting home.

Commissioner Downey stated that the Commission should not be valuing things necessary to run a campaign, such as desks and phones, but that if committees are investing in items of great value, it should be dealt with. Otherwise, he suggested that the Commission leave the bracketed language out of the regulation. He noted that the proposed regulation included a catch-all phrase, "and any other committee investments valued at fair market value;" which would cover those items of great value.

Commissioner Swanson agreed.

There was no objection from the Commissioners to deleting the bracketed language in proposed regulation 18531.6(d)(3)(A).

Ms. Armstrong explained that the bracketed language in Decision 3 would put the onus on the contributor to designate the contribution for a particular election for the first time. This is included in the federal regulations. Ms. Armstrong suggested that the language be removed.

There was no objection to removing the language.

Lance Olson suggested that the word "estimated" in proposed regulation 18531.6, page 2, line 3, be deleted because it was unnecessary.

Ms. Armstrong agreed.

Jim Knox, with California Common Cause, reiterated his request that fundraising for elections prior to January 1, 2001 should not be allowed beyond the net debts of the committee. He stated that any monies raised beyond those net debts would be used for elections after January 1, 2001 and should be subject to the Proposition 34 limits. He urged the Commission to limit the amount candidates can raise in contributions not subject to the Proposition 34 limits to the total amount of the debt.

Ms. Schafer agreed with Mr. Knox, noting that, otherwise, a loophole would be created. She stated that the plain reading of Proposition 34 would support their position.

In response to a question, Mr. Knox stated that his position was consistent with § 85321, because that statute allows fundraising after the election if there are still debts associated with that election. His position was that § 85321 allows fundraising beyond the Proposition 34 limits, but not beyond the net debt. He suggested that, if adopted as proposed, candidates with an open committee from the year 2000 will be able to raise as much money as they want for those committees.

Commissioner Scott stated that if the proposed regulation allows fundraising beyond the amount of the net debt, she would not support the proposal.

Ms. Armstrong stated that staff interpreted the Commission's decision regarding § 85316 to mean that the fundraising was not limited to the net debt. She explained that the *Olson* advice letter interpreted the statute that way.

Commissioner Scott noted that the *Olson* advice letter was issued prior to the recent legislative action, and suggested that the legislative action limited the Commission's interpretation.

Ms. Armstrong responded that she did not think that the interpretation of § 85321 was completely clear, and noted that staff has not had time to completely analyze that statute.

Ms. Menchaca noted that the issue dealt with cumulative net debt, and § 85321 clarifies that the contribution limits of §§ 85301 and 85302 do not apply. That interpretation is consistent with the regulation. The new statute does not address the cumulative net debt issue.

Commissioner Scott noted that it reads, "if you have net debt…" and stated that the Commission was making an interpretation regarding whether that law applied to prior election. Now that there is a law she questioned whether the Commission should reconsider its decision.

Chairman Getman stated that the regulation is with regard to § 85316, which was not changed by SB 34. She believed that § 85321 codified one part of § 85316, and did not change the way § 85316 should be read.

Commissioner Scott stated that the legislature cleaned up the law more narrowly than the Commission determined, and questioned whether the Commission would be subject to a lawsuit for enacting a regulation that is in excess of the Commission's scope of authority under the statute.

Chairman Getman did not agree with that reading.

Commissioner Scott noted that the proposed interpretation would render § 85321 irrelevant.

Chairman Getman responded that it keeps the Commission from changing its mind on part of the regulation for § 85316, and is consistent with what the Commission had decided. She noted that the legislature could have changed § 85316 if they thought that the Commission was interpreting it incorrectly, but that they did not.

Commissioner Scott argued that the sections should be read as a whole, and that the Commission should pass a regulation that is narrowly tailored in order to avoid a lawsuit.

Ms. Menchaca pointed out that the Commission had two advice requests addressing similar questions and that there may be fundraisers being conducted now which may be impacted by the Commission's decision.

Chairman Getman noted that the Commission has already voted twice on this issue, and that it may get sued if it changes the interpretation at this point. She noted that it is up to the courts to determine whether the Commission is interpreting the statute correctly.

In response to a question, Ms. Armstrong explained that the Commission had concluded that § 85316 did not apply to elections prior to the effective date of Proposition 34 because that would have been a retroactive application of the statute. Therefore, if the statute did not apply, nothing within the statute should apply.

Commissioner Swanson questioned why proposed regulation 18531.6(a)(2) needed to be included in the regulation at all.

Chairman Getman noted that including it made it easier for Technical Assistance staff to use when giving advice.

Chairman Getman motioned that the Commission adopt regulation 18531.6 with the five clarifications made during the meeting.

Commissioner Scott requested that a narrower motion be voted on first.

Chairman Getman, Commissioners Downey, Knox and Swanson voted "aye." Commissioner Scott voted "nay." The motion carried by a vote of 4-1.

Commissioner Scott motioned that the Commission approve regulation 18531.6 with the limitation raised by Common Cause, with the language reading, "contributions for an election held prior to January 1, 2001 may not be accepted in an amount that exceeds net debts outstanding."

The motion failed for lack of a second.

The Commission adjourned for a break at 10:55 a.m.

The Commission reconvened at 11:10.

Item #7. Campaign Disclosure Forms—Approval of Form 460 instructions and 2001 Campaign Manual Addendum.

Technical Assistance Division Chief Carla Wardlow presented the Form 460 instructions for the Commission's approval. She noted that the instructions refer to a fact sheet, and that staff would have that ready for the Commission's review at the next meeting. She explained that staff would need to prepare something for the interim in order for people to comply with the October 10, 2001 filing deadline.

There was no objection from the Commission to allowing Technical Assistance staff to mail the fact sheet before the Commission reviews it at the next Commission meeting.

Ms. Wardlow noted that the draft Campaign Addendum included alternative paragraphs accommodating different options if SB 34 passed. Since it has been passed and signed into law, she has made the appropriate changes.

Chairman Getman suggested that the Form 460 Schedule D instructions move the statement, "Campaign funds of a candidate or officeholder may not be used to make independent expenditures," from the lower right-hand corner of the page to the bulleted list on the left side of the page.

Ms. Wardlow suggested that the statement be further clarified to incorporate the language of SB 34 clarifying that the independent expenditures cannot be made to support other candidates. A candidate's controlled committee could make independent expenditures to support or oppose a ballot measure.

Chairman Getman noted that the statement would read, "Campaign funds of the candidate or officeholder may not be used to make independent expenditures to support or oppose other candidates."

Ms. Wardlow agreed.

Commissioner Swanson suggested that the forms include information advising people where to file the forms.

Ms. Wardlow responded that the forms are filed in many different locations, depending on where the candidate or committee is active. Consequently, there were too many addresses to include on the form.

Commissioner Swanson noted that treasurers have requested this information from her. She questioned whether Technical Assistance had identified problems relating to this and whether they thought providing the information might be helpful.

Ms. Wardlow responded that the front page of the instructions refer people to further information regarding where to file. She added that the main addresses are available on the web site. Ms. Wardlow suggested that the back side of the form could be utilized to provide general information regarding where to file, and requested that staff not be required to bring the form back to the Commission for approval should the Commission decide to do that.

Commissioner Swanson requested that, if possible without creating major printing or cost problems, staff include this information on the document. She did not see any reason for staff to bring it back to the Commission for review.

Chairman Getman agreed. She noted the importance of getting the forms out to the public for the upcoming filing by the end of the week.

There was no objection from the Commission.

Diane Fishburn, from Olson, Hagel, Waters and Fishburn, commented that the instructions for Schedule E did not change the instructions for credit card payments. She noted that the law was changed this year to raise the threshold for reporting subvendor payments to $500 or more. She stated that she was informed by staff that it had not been changed from $100 because they thought that credit card vendors should be treated differently. Ms. Fishburn saw nothing in the history of the regulations that suggested that credit card vendors should be treated differently from any other type of vendor.

Ms. Wardlow responded that staff studied this issue carefully when implementing SB 2076, and, after discussions with the Legal Division, determined that using a credit card is like using your checkbook. The credit card company is not making payments on behalf of the committee for goods or services. She noted that the Act discusses payments by agents and independent contractors being reported, but staff did not believe that credit card companies served as an agent or independent contractors.

Ms. Fishburn responded that the legislature addressed the threshold levels last year, and that the distinction was not brought to their attention. She stated that it should be considered by regulation and not by instructions on the form.

Ms. Menchaca agreed that the Commission had not looked at this issue recently. She agreed with Ms. Wardlow, but suggested that it could be removed from the form at this time for further review. She noted that staff should review the Commission's opinion to the Republican Party regarding credit cards to learn whether there are any additional issues that need to be considered.

Chairman Getman suggested that the paragraph be deleted for now, and include the issue in the fact sheet. She suggested that it could be addressed through advice letters or that it could be dealt with by regulation.

Ms. Fishburn suggested that staff discuss it further with the Commission and not make the determination of how to interpret the law for purposes of the fact sheet.

Chairman Getman responded that staff was authorized to review the issue and bring it back to the Commission if they need to, or make the determination if they think it is clear. She noted that the form must be sent out quickly, and that she was confident that the staff would bring it back to the Commission if it was necessary.

Ms. Menchaca explained that the fact sheet will deal with other reporting issues that the Commission is reviewing. The fact sheet will summarize what the reporting rules are and will advise the public that the Commission has yet to approve a final regulation for that issue.

Jim Sievesind, from Reed and Davidson, stated that during the IP meeting, staff stated that if a PAC received more than $5,000, they could not make contributions to state candidates. He questioned the language reading, "Contributions received by committees for the purpose of making contributions to candidates for elective state office are also subject to limits," on Form 460, Attachment A, page 1 (cover page).

Ms. Wardlow responded that staff was advising that if a committee wanted to make contributions to state candidates and receive contributions in excess of $5,000, the excess money should be put into a separate bank account to be used for non-state candidate purposes.

Mr. Sievesind responded that the language of § 85303(b) may not require that state PACs set up a separate bank account in order to do that.

Ms. Menchaca stated that there was an advice letter pending regarding that issue, but that there was not a regulatory solution.

Mr. Sievesind stated that he did not think that a regulatory solution was necessary because the law was clear.

Ms. Schaffer stated that the instructions refer to Technical Assistance Manual on Campaign Disclosure. She noted that, on the cover sheet of the Addendum, the words "Technical Assistance" do not appear, and suggested that the wording be changed.

Ms. Wardlow suggested that the form be changed to reflect the appropriate name of the manual.

Chairman Getman agreed.

Chairman Getman motioned that the form instructions be approved.

Commissioner Downey seconded the motion.

There being no objection, the Form 460 instructions were approved.

Chairman Getman referred staff to page 11 of the 2001 Addendum, noting that it contained a reference to a Form E-530, Issue Advocacy Report, which she was not familiar with.

Ms. Wardlow responded that the Commission adopted an emergency regulation at its June 2001 meeting implementing the statute on issue advocacy. From that the Secretary of State developed an electronic form and staff assigned that number to the form. There was no paper form for this section because there is no paper filing requirement.

Chairman Getman noted that the form is not referenced on either the FPPC web site nor the Secretary of State's website, and suggested that both agencies update their web site lists of forms.

Chairman Getman stated that staff would be deleting references to fax-on-demand in the instructions because the agency will be discontinuing that service. Staff conducted a cost analysis and determined that it would be more efficient to phase out the program since all of the information is now available on the web site or can be mailed upon request.

Chairman Getman motioned that the Addendum be approved.

Commissioner Swanson seconded the motion.

There being no objection, the motion carried.

Item #8. Campaign Disclosure Forms - Electronic Filing.

Caren Daniels-Meade, Chief of the Political Reform Division of the Secretary of State's (SOS) office, provided a status report on the electronic filing charges necessitated by the

adoption of new forms. She explained that the SOS, Commission staff, and vendors have been working on an interim solution to address the difficulty presented when a new form is adopted but there is no means to electronically file the new Form 460 for the October 10, 2001 filing deadline.

Ms. Daniels-Meade reassured the Commission that the SOS will be ready to accept the 90-day LCR and LIE filings on December 5, 2001, and will be fully implemented on all of the changes by the time that the January 10, 2001 filings are due.

Ms. Daniels-Meade reported that a method had been designed to comply with the Form 460 electronic filing requirements by using the electronic version of the old form and attaching electronic memo fields in those places where new data is required that was not required on the former form. They developed a format that would provide the vendors and treasurers with the specific instructions for implementing that requirement and e-mailed it to the Commission, vendors, and members of the California Political Treasurer's Association.

Ms. Daniels-Meade explained that the Cal-Access system includes a number of complex systems used by the SOS and described those systems. SOS staff learned that several of the vendors rely upon the SOS print engine in order to generate the paper report that they have to file along with the electronic filing. It became a problem for them because their system cannot support more than one version of the forms. They have advised the vendors that they are to use the electronic memo field for the electronic filing system, and that the FPPC will be contacting them directly to advise them on how to make similar modifications to the paper forms. Additionally, they have advised vendors and treasurers that they will be asked to file the new Form 460 as an amendment to the October 2001 filing once the new format is in place.

Ms. Daniels-Meade noted that this is not an ideal solution, but is workable, and it captures the new data elements that appear on the new Form 460. She estimated that there would be no more than 500 filings for the October 2001 report. Sample test forms will be sent out to vendors so that they can start preparations for the recertification within the week.

Ms. Daniels-Meade stated that FPPC was providing excellent service to the SOS in working with this issue, and thanked the Commission and staff for their assistance.

Chairman Getman thanked Ms. Daniels-Meade, noting that implementation of the initiative in time for the October filings has been difficult for both agencies, vendors and the regulated community. She explained that the revised Form 460 that the Commission adopted in June represents the Commission's interpretation of disclosures that filers have to make in October in order to meet their filing obligations under Proposition 34 and SB 2076.

Ms. Getman suggested that vendors submit to the FPPC, prior to the filing, a written request for advice as to whether their form meets the requirements for the October filing.

The request should include a paper form that may not look identical to the new Form 460 but that contains the essential information required by the new Form 460. She hoped that this would give everyone some flexibility for the interim filing, until the electronic versions of the forms are finalized in January.

Sheryl White, from Statecraft, stated that her company published political software dealing with the FPPC forms. She noted that their system is very complex and addresses most of the treasurer's responsibilities, not just the reporting responsibilities. The development of the software takes a reasonable amount of time in order for it to be complete. She noted that it took four years to get the original software on the market.

Ms. White reported that the most time-consuming of the recent changes are those related to the policy changes in transfers. She did not object to the change, but asked that they be given enough time to implement the changes, and noted that eight weeks was not enough time.

Ms. White stated that Statecraft would work on the paper Form 460 first because it is done separately from the electronic form, and because they also deal with filers who are not statewide election filers.

Item #13. ***In the Matter of Danny Lynn Gamel, Dan Gamel, Inc., and Rudy Michael Olmos, FPPC No. 99/193, OAH No. N2001020159.***

Chairman Getman explained that the Commission could adopt, reject or modify the decision from the administrative law judge on this enforcement case.

Staff Counsel Mark Soble explained that the respondent had changed attorneys twice during this case. Commission staff had made both telephone and written contacts with the respondent's attorney regarding the Commission's consideration of this case on the September 10, 2001 agenda. The attorney's office advised staff that they did not plan to appear at the Commission hearing.

Mr. Soble noted that respondents Danny Lynn Gamel and Dan Gamel, Inc. were charged with laundering three campaign contributions of $975 each to Fresno City Council candidate Ken Steitz. Respondent Rudy Olmos was charged with a single count of serving as an intermediary for a campaign contribution without disclosing required information to the contribution's recipient.

Mr. Soble explained that Administrative Law Judge Ann Sarli issued a proposed decision finding that all four violations occurred as charged in the accusation, and found that the violations were both serious and intentional. She imposed the maximum fine for all of the violations. The findings of fact were consistent with the evidence presented at hearing. Enforcement Division staff recommended that the Commission adopt the ALJ proposed decision in its entirety and without modification.

The Commission adjourned for closed session at 11:55 p.m.

Commissioner Scott left the meeting after the closed session lunch break.

The Commission reconvened at 1:56.

Chairman Getman announced that the Commission had agreed to adopt the proposed decision of the Administrative Law Judge in the *Gamel* case in its entirety.

Item #6. Legal Division Regulations Calendar - September Work Plan Revisions.

Assistant General Counsel John Wallace presented the proposed regulation calendar.

There being no objection, the proposed regulation calendar was approved on consent.

Item #9. Proposition 34 Regulation: § 85702 Lobbyist Prohibition on Contributions; Pre-notice Discussion of Proposed Regulation 18572.

Staff Counsel Scott Tocher explained that the staff memorandum outlined the history of attempts to enact prohibitions to lobbyist contributions, noting that, based on the analysis, staff proposed that the statute be read to limit the ban on lobbyist contributions to use of personal funds of the lobbyist. He noted that the reference in the statute to the terms of making a contribution and defining a contribution refer to the Commission's existing definitions of those terms.

Mr. Tocher noted that subdivision (b) clarifies that § 85311, governing affiliated entities and aggregating contributions under certain circumstances, applies to the lobbyist prohibition scenario. He explained that the subdivision is a part of Chapter 5, and that there may be circumstances where the provisions of § 85311 might be applicable.

Mr. Tocher pointed out that subdivision (a) refers to "personal funds," and subdivision (b) refers to funds that may come as a result of the specific control that the lobbyist may have as defined under § 85311. He confirmed that if the lobbyist has control over the funds the lobbyist could not make a contribution from those funds.

Commissioner Swanson questioned whether a lobbyist representing an organization could collect contributions from members of that organization if the issue at hand would benefit that organization.

Mr. Tocher responded that the lobbyist could collect those contributions.

Chairman Getman pointed out that if the lobbyist were on the board of the organization and controlling how those contributions would be spent, then those contributions might be handled differently. She noted that Proposition 34 does not prevent a lobbyist from collecting contributions to give to a candidate.

Mr. Tocher explained § 85311(b)(c) and (d), and their aggregation provisions.

Commissioner Knox questioned the need for the language, "In addition to contributions described in subdivision (a) of this regulation," in proposed regulation 18572(b).

Mr. Tocher responded that staff did not want to say that it was an exception to (a), so provided that language as transitional phrasing.

Chairman Getman agreed that the phrase was not necessary.

Mr. Tocher agreed to delete the phrase.

Mr. Tocher explained that subdivision (c) governs contributions to political parties or PAC's. Option 1 of the proposal reflects the notion that those contributions, once they reach the entities, are out of the control of the lobbyist and therefore represent no issue. There may be circumstances, however, where lobbyist contributions to these groups could be earmarked for candidates. For those cases, there may need to be a safeguard that would prevent the political parties or PACs from being a conduit for contributions by the lobbyist.

Mr. Tocher explained that Option "A" represents advice currently being given by staff over the telephone. In response to a question, he clarified that it applied to contributions to legislative and statewide offices. He noted that telephone advice is often conservative when there is an undetermined answer.

Commissioner Swanson questioned whether it would be enforceable.

Chairman Getman stated that the basic policy question was whether the statute covers anything other than the lobbyist contributing personal funds to a candidate, and whether to include safeguards to ensure that the contribution does not go to the candidate. She noted that Proposition 34 has other sections with similar earmarking requirements and provided examples.

Chairman Getman explained that the easiest way to interpret the statute would be to provide that the lobbyist cannot use personal money to contribute to a candidate, keeping the regulation narrow. However, there may be situations where the lobbyist contributes to a PAC and the PAC then gives the money to the candidate, making the lobbyist prohibition almost meaningless.

Mr. Tocher agreed, noting that there could also be a circumstance, addressed partially by option "B," whereby a committee that is primarily formed for a candidate could receive the contribution.

Chairman Getman noted that she was not sure that option "B" correctly addresses the scenario of a lobbyist sitting on a board of an association that makes decisions about other people's money.

In response to a question, Mr. Tocher stated that a lobbyist would be able to contribute to a political party even if that lobbyist was registered to lobby the legislature or state officers under option "B," because the political parties are not "primarily formed" to support or oppose a given candidate.

Chairman Getman noted that the language of § 85702 may not support prohibiting contributions by lobbyists to entities other than elected state officers because the statute has a narrow prohibition.

Commissioners Knox and Downey agreed.

Commissioner Downey stated that he did not support options "A" or "B", and asked whether, if subdivision (c) were deleted, there was a safeguard in the laundering provisions that would prevent a lobbyist from contributing to a committee for the purposes of supporting a candidate.

Chairman Getman responded that there is a prohibition against earmarking contributions.

Enforcement Chief Steve Russo stated that enforcement staff often had difficulty identifying who is controlling the contributions in aggregation cases.

Commissioner Knox questioned whether the Commission should include the aggregation provisions in proposed regulation 18572(b).

Ms. Menchaca responded that the purpose of subdivision (c) is to address whether to apply Government Code § 85303, the earmarking provision, in this context. She suggested that subdivision (b) could provide that the contributions governed by § 85702 are subject to aggregation of § 85311 and earmarking of § 85303. It would not be necessary to explore how the substance of § 85303 should be interpreted, but the Commission would need to determine whether those provisions would be applicable. She encouraged the Commission to keep the language in bracketed form so that staff could bring further analysis back to the Commission.

Ms. Menchaca noted that it would be helpful to the public if they knew that the Commission views §§ 85311 and 85303 to apply or not to apply in this context. If the Commission were to delete subdivision (c) and add nothing, the references to §§ 85303 and 85311 in the reference section might not be enough to alert the public that they must consider this in the lobbyist context.

Chairman Getman questioned whether § 85303 applied since it concerned limits on contributions to committees and political parties.

Commissioner Knox questioned whether the question of directed contributions under § 85311 was prohibited by § 85702.

Chairman Getman suggested that § 85303 does not apply to contributions made to candidate committees. Therefore, if the lobbyist prohibition concerns making contributions to a candidate committee, § 85303 would not apply.

Ms. Menchaca responded that subdivision (c) of that section states that, "nothing in this chapter shall limit a person's contributions to a committee or political party provided the contributions are used for purposes other than making contributions to candidates for elective state office," and suggested further analysis on the issue.

Chairman Getman noted that she and Commissioner Knox viewed the lobbyist prohibition as being fairly narrow and focused on contributions from a lobbyist directly to a candidate.

Commissioner Downey agreed with that analysis, and noted that the Commission should be very cautious in this area because of constitutional issues.

Chairman Getman stated that if staff believed that §§ 85311 and 85303 applied, the Commission would need further analysis delineating how those statutes would apply.

Mr. Tocher presented a hypothetical situation whereby a lobbyist forms a committee to support or oppose a given candidate for legislative office. If those lobbyists are registered to lobby the legislature they would not be able to make a contribution individually, and Mr. Tocher questioned whether those lobbyists could then contribute as a committee.

Chairman Getman suggested that if the lobbyists donated to a committee established solely for the purpose of supporting a candidate the lobbyist would otherwise not be able to support through contributions, it should be deemed a violation of the law.

Commissioner Knox stated that it could be considered earmarking.

Mr. Tocher questioned whether the Commission had established that contributions to primarily formed committees are earmarked contributions.

Chairman Getman suggested that staff draft narrow language that would not be so broad as to prohibit contributions by lobbyists to other committees.

Chairman Getman questioned whether the Commission had authority in the statute for proposed regulation 18572(f). She noted that the statute prohibits lobbyist donations to a candidate running for an office that the lobbyist is prohibited from lobbying, but is not prohibited from donating to the office the candidate currently holds.

Mr. Tocher agreed that without subdivision (f) that would occur.

Chairman Getman stated that she understood the policy behind subdivision (f), but that the statute allows contributions from a lobbyist to an appointed state officer even though the lobbyist is registered to lobby the appointed state officer's agency.

Ms. Menchaca suggested that staff hold an IP meeting to solicit public input or come back to the Commission with further language. She noted that the regulation is drafted to specify the things that are not prohibited in order to give the public guidance.

There was no objection from the Commission to staff conducting an IP meeting and returning to the Commission with further analysis.

Chairman Getman noted that staff may have more direction from Judge Damrell at that point.

Tom Hiltachk, on behalf of IGA, supported an IP meeting. He stated that the legislature, when drafting Proposition 34, used specific language defined in the Act, and intended the prohibition to apply only to personal contributions from lobbyists. He believed that if the Commission expanded that prohibition it would infringe on lobbyists' First Amendment rights. He did not support a regulation that includes a list of things lobbyists can do.

Mr. Hiltachk noted that the aggregation rule is designed to ascertain whether contribution limits are being adhered to, and is not designed to work as a ban.

Chairman Getman asked Mr. Hiltachk whether a group of lobbyists registered to lobby the legislature would be prohibited from forming a PAC under Proposition 34.

Mr. Hiltach did not think that it would be prohibited. He noted that Proposition 34 was designed to prohibit the sort of face-to-face exchange of a lobbyist taking money out of their pocket when dealing with someone they are about to lobby. It should not be read to mean that lobbyists cannot associate with persons of like political mind.

Commissioner Knox noted that § 85311(b) requires aggregation and might justify § 85702 to mean that a lobbyist cannot direct or control contributions to agencies where the lobbyist is registered to lobby.

Mr. Hiltachk responded that the aggregation rule was designed as a reporting rule to determine who has to report together. If not handled carefully, he warned, the Commission could be prohibiting more people from making contributions and may be extending the ban beyond that contemplated by Proposition 34.

Commissioner Knox agreed that it needs to be done carefully, but noted that the language is binding.

Mr. Hiltachk pointed out that § 85702 does not refer to that section, and suggested that further study be done to ensure that the ban is not extended.

Lance Olson commented that SB 34 amended § 85311 to read, "For purposes of the contribution limits of this Chapter." He noted that the current provision is limited for purposes of the limitations within Chapter 5.

Commissioner Knox responded that Mr. Hiltachk's point is significant if the Commission were to decide that § 85702 is not a limitation on contributions. However, Commissioner Knox read § 85702 to be a limitation on contributions.

Mr. Olson responded that he was not taking a position on that issue, but that staff should consider it. If the affiliated entity rule were to apply, then he recommended that the Commission explain what it means, specifically delineating what is prohibited.

Mr. Olson noted that subparagraph (d) seemed like an odd thing to include in the regulation because it provides for what a lobbyist can do but does not include what a lobbyist cannot do. He questioned whether activities not listed should be considered violations.

Mr. Olson agreed that the Legislature was aware of the history of efforts to regulate lobbyist contributions in the past and of how those had been found to be unconstitutional. He believed that the Legislature intentionally wrote the prohibition narrowly.

Commissioner Knox stated that he shared Mr. Olson's concerns about subdivision (d) and asked staff to further study the issue.

Item #10. Proposition 34 Regulations: Extensions of Credit and Personal Loans (§ 85307) – Pre-Notice Discussion of Proposed Regulations 18530.7 and 18530.8.

Staff Counsel Holly Armstrong explained that § 85307 deals with extensions of credit and personal loans. Regulation 18530.7 is a modification of the previous extensions of credit regulation adopted under Proposition 208. That regulation was the result of a lengthy but cooperative effort between staff and the regulated community.

Chairman Getman noted that Proposition 208 was very different from Proposition 34. She noted that the first line of § 85307(a) addresses extensions of credit, but that the only provision regarding personal loans is in subsection (b), and prohibits a candidate from making a personal loan exceeding $100,000 to the candidate's own campaign. She questioned whether the proposed regulation was based on a statute that does not exist under Proposition 34. A regulation was needed under Proposition 208 to interpret extensions of credit because they could be subject to contribution limits.

Ms. Armstrong responded that the only place that the phrase, "extensions of credit," exists in the Act now is in § 85307(a), and that the phrase needed to be defined.

Chairman Getman asked whether it was being defined only for the purpose of providing that extensions of credit to a candidate's personal campaign cannot be for more than $100,000.

Commissioner Knox asked what would happen once it was defined as a loan.

Ms. Menchaca responded that staff viewed subdivisions (a) and (b) to be analyzed separately, and that subdivision (b) was not meant to narrow subdivision (a). There are other provisions of the article that would encompass the contribution limit and other sections.

Chairman Getman stated that if staff requested a regulation defining contributions to include an extension of credit because there are now contribution limits, she would support it. She noted that the only provision of the article that regards loans is under subdivision (b), indicating that the candidate cannot have more than $100,000 outstanding in an extension of credit by the candidate.

Mr. Wallace stated that the paragraph expressly contemplates loans from other sources, including commercial lending institutions.

Chairman Getman questioned whether subdivision (a) addressed a candidate who takes out a loan from a commercial lending institution in order to loan the money to the candidate's own campaign.

Mr. Wallace responded that staff believed the regulation addressed extensions of credit from third parties, not limited to just the candidate.

Ms. Menchaca pointed out that it was for the purpose of determining when an extension of credit becomes a contribution for the contribution limits of chapter 5. By referencing chapter 5 and article 3 in subdivision (a), staff intended to draft a regulation that addressed contribution limit purposes, and did not intend to draft a definition of "extension of credit" for anything else under the PRA.

Commissioner Knox questioned whether the Commission should be concerned about defining "extension of credit" except for the purpose of defining it as a loan subject to the $100,000 cap on loans made by a candidate to the candidate's own campaign.

Chairman Getman responded that the Commission should be concerned because, since there are now contribution limits, it is important to ensure that vendors are not extending credit indefinitely. Those extensions of credit would essentially be a contribution subject to limits. She did not believe that the proposed regulation defined "extension of credit" for purposes of § 85307.

Ms. Armstrong stated that the only place "extensions of credit" appears in the Act in in § 85307(a).

Chairman Getman noted that the definition does not have to be put with the proposed regulation.

Ms. Menchaca agreed.

Commissioner Knox suggested that staff develop a regulation defining "extension of credit," and providing that the extension of credit or loan shall be a contribution counted toward the cap when it meets certain criteria.

Ms. Menchaca stated that it would not be advisable at this time to have a regulation defining "extension of credit," and outlining when that becomes a contribution for purposes other than § 85307.

In response to a question, Commissioner Knox stated that a loan could come from a supporter and not just the candidate if the Commission was addressing when the loan or extension of credit becomes a contribution.

Ms. Menchaca suggested that staff could look into the definition of "contribution" to determine whether addressing "extension of credit" in that regulation would be appropriate. She noted that it would be a much broader project.

Chairman Getman agreed that there needed to be a definition of "extension of credit" delineating when that extension becomes a contribution, but questioned whether the regulation properly addressed § 85307. She interpreted the proposed regulation to mean that subdivision (b) also applied to extensions of credit but does not apply to loans made to a candidate by a commercial lending institution.

In response to a question, Ms. Menchaca confirmed that a candidate cannot solicit a loan from a contributor who has already reached the maximum contribution limit for that campaign.

Ms. Wardlow noted that the definition of "contribution" in article 2 would preclude the contributor from making the loan.

Mr. Wallace stated that when the term "contribution" is used in the contribution limit sections it incorporates, by reference, the definition of "contribution" in other articles. He suggested that it could be read either way for purposes of the discussion, and that it could be read to reach beyond the candidate's extension of credit to the candidate's own committee.

Chairman Getman agreed that the regulation could be viewed in a general way, but did not agree that the regulation addressed only § 85307. She stated that there was a need for the regulation for purposes of determining when an extension of credit becomes a contribution

limit, but did not agree with staff's interpretation of § 85307. The specific phrase, "The provisions of this article…" beginning subdivision (a) limits the interpretation.

Commissioner Downey suggested that the use of the word, "article" may have been an error by the drafters.

Chairman Getman agreed that the drafters may not have intended to write the section so narrowly, but noted that the words must be given some effect.

Chairman Getman agreed with staff's draft definition of "extension of credit" and addressing when an extension of credit becomes a contribution. She did not believe that it was applicable in the context of § 85307.

Mr. Wallace suggested that the language as drafted would be better placed interpreting the actual limit section.

Chairman Getman agreed, noting that it could be included in the definition of "contribution," or as an interpretation of § 85301 (the basic limits).

In response to a question, Ms. Wardlow suggested that the Commission consider § 82015 and then § 84216.

Chairman Getman responded that if the statute had referred to the provisions of § 84216 regarding loans it would work.

Ms. Armstrong noted that an extension of credit was different than a loan.

Chairman agreed that the proposed regulation appropriately addresses when the extension of credit becomes a loan, but did not agree with staff's interpretation of § 85307 (a).

Mr. Wallace suggested that staff could further analyze the issue and bring it back to the Commission.

In response to a question, Ms. Armstrong stated that the regulated community thought that the regulation was needed and that the prior regulation was what they wanted. She modified the prior regulation to fit into the structure and scheme of Proposition 34. The issue of when the extension of credit became a contribution was not discussed at those meetings.

Chairman Getman suggested that the Commission discuss the loan provision of the regulation, but ask staff to review how subsections (a) and (b) fit together (setting aside proposed regulation subsections (a) and (e)) and where the definition of "extension of credit" belongs.

Ms. Armstrong explained that subsection (c) of the proposed regulation addresses the period of time after which an extension of credit becomes a contribution, and that staff did not have a recommendation for the time span. She pointed out that Proposition 208 had a 30-day time span, and that the regulated community did not object to that time span.

Commissioner Swanson suggested that 30-days was sensible.

In response to a question, Ms. Armstrong stated that if the Commission selected 30-days as the appropriate time span, a vendor could start out as an extender of credit. If the credit had not been paid within the time specified in the regulation, it would become a loan and the vendor would become a lender. If the loan is not paid within the time specified in the regulation, it becomes a contribution and the lender becomes a contributor.

There was no objection to the 30-day time span for Decision 1.

Chairman Getman suggested the words "provider or vendor…" on line 14 of proposed regulation 18530.7 be changed to "vendor or provider..." She also suggested that the word "person" on line 15 be changed to, "vendor or provider of goods or services" to keep it consistent with line 14. She questioned whether a provider and a vendor were the same.

Ms. Armstrong agreed that the language should be consistent, but believed that vendor and provider were two different things and that both should be included in the wording.

Following general discussion over whether "provider" and "vendor" meant the same thing, it was decided that they were different and should both be included in the wording.

Ms. Armstrong explained that subdivision (f) is the "safe-harbor" provision, giving vendors or providers of goods or services an opportunity to protect themselves. Subdivision (g) provides the scope of the applicability of the regulation.

Commissioner Downey suggested that the word "providing" on line 4 of subdivision (a) be changed to "provision."

Ms. Armstrong explained that proposed regulation 18530.8 would impose a $100,000 limit on the outstanding balance of the personal loans that a candidate may have to his or her campaign. She noted that subdivision (a) addressed personal loans made by candidates to their campaigns prior to January 1, 2001. Decision 1, option "a" would allow that such loans do not count toward the $100,000 limit, and option "b" would allow that such loans do count toward the $100,000 limit.

Chairman Getman asked whether a candidate who has a $150,000 balance of loans in the candidate's campaign committee on January 2, 2001 would be in violation of the law under subsection "b."

Ms. Armstrong responded that the candidate would be in violation of the law.

Chairman Getman noted that the Commission could not direct that the person suddenly violated the law on January 2, 2001.

Mr. Wallace clarified that the person had reached their limit and would not be able to make any more loans to their campaign.

Chairman Getman noted that the Commission would need to decide whether the $100,000 should be per election or in total.

Commissioner Swanson stated that it had to be per election.

Ms. Armstrong pointed out that it's a question of whether to apply the statute retroactively.

Chairman Getman stated that if it was per election it would not be retroactively applied, but that it would not matter because the $100,000 would begin again with the new election. If it was a cumulative cap, then it would matter because the candidate would not be able to get any more loans.

Commissioner Swanson stated that "per election" could refer to primary election and general election, or it could mean running for reelection for the same office. Each time the candidate should be allowed to loan himself or herself $100,000.

Chairman Getman stated that the statute could be read to mean that if the candidate has an outstanding balance of loans no additional loans can be made to the candidate. Alternately, it could be read to mean that, if a candidate has loans that are being paid off, the candidate may loan himself/herself more money providing the outstanding balance is not more than $100,000.

Commissioner Knox agreed.

In response to a question, Ms. Armstrong stated that defining "campaign" was felt by staff to be inadvisable because, even though it might be limited to purposes of this section only, it could be used in other contexts.

Commissioner Downey stated that the plain meaning of campaign refers to those elections pertaining to one office and suggested that the plain meaning of campaign be used for purposes of the regulation.

Chairman Getman noted that, under Commissioner Downey's plain meaning interpretation, campaign and election would have different meanings.

Ms. Menchaca stated that both options of decision 2 were intended to be a definition of "campaign." One option provides a "per election" definition and the other option combines

all of the candidate's controlled committees' funds. Staff could draft language stating that the term "campaign" was being defined.

Commissioner Downey noted that it seems to fit with what the statute intended, limiting the advantage the very wealthy candidates have in any given campaign.

Chairman Getman suggested that another option was needed to incorporate Commissioner Downey's suggestion because under the plain meaning of "campaign" a candidate could not loan $100,000 for the primary election and $100,000 for the general election. The candidate could only loan $100,000 total for both elections because they encompass one campaign.

Commissioner Downey noted that a determination would need to be made as to when a campaign begins.

In response to a question, Chairman Getman stated that the third option might be stronger in a court challenge because it gives the word "campaign" a meaning that is different than "election."

Commissioner Swanson stated that it could be argued that it should be interpreted on a "per election" basis. She noted that, very often, there are different campaigns for the primary and general elections.

Mr. Wallace noted that staff initially thought that it could be written without actually defining "campaign."

In response to a question, Ms. Armstrong stated that the word "campaign" is used in other sections of the Act.

Mr. Wallace stated that if "campaign" is defined in this regulation there would be no way to limit it to being used only for this regulation.

In response to a question, Ms. Armstrong stated that it would be fairly easy to modify the aggregate definition in option (a) to comport with Commissioner Downey's suggestion.

In response to a question, Mr. Wallace noted that § 85201 refers to campaign accounts, which is another regulation issue staff will be presenting to the Commission at its October 2001 meeting. Staff is proposing through those regulations that every election is a different campaign, tying it to election and reelection. Staff is dealing with "campaigns" in the carryover issue also. Staff was concerned that defining "campaign" might inadvertently settle other issues.

Chairman Getman stated that the statute uses the term and that the statute must be interpreted and cannot be done in a vacuum.

Ms. Menchaca pointed out that part of the discussion relates to analyzing how subdivision (b) fits in for purposes of subdivision (a). The Commission directed staff to look into analogous provisions that are helpful for interpretation, but subdivision (a) is somewhat limited. She asked whether staff should be looking at other provisions.

Chairman Getman noted that subdivision (a) is limited but subdivision (b) is not.

Ms. Menchaca asked whether subdivision (b) could be viewed independently from subdivision (a). She was concerned that if (b) were linked to (a) it might narrow where to look to define "campaign."

Chairman Getman responded that subdivisions (a) and (b) are absolutely linked, but she did not know that the Commission could immediately determine whether the loan issue should be per election or once over the course of the campaign. She questioned whether there was any guidance in how the word "campaign" is used. If there is not, the Commission would have to make that determination. She did not want to make that decision if there is something else in the Act that could provide statutory guidance.

Ms. Menchaca suggested looking at the "one bank account" issue since that is linked to the election to a specific office as a third approach, as opposed to a primary/general.

Mr. Wallace suggested that staff research the issue and come back with more options.

Commissioner Swanson asked whether using the "plain meaning" definition of "campaign," as explained by Commissioner Downey, would include future elections for the same office.

Commissioner Downey responded that a reelection campaign to the same office would not be the same campaign.

Chairman Getman noted that the Commission would have to make that decision. She stated that, in its most extreme form, it could be read to mean that the candidate can get a $100,000 loan, and until it is repaid no further loans can be made to any of the candidate's campaigns.

None of the Commissioners supported that interpretation.

Chairman Getman clarified that the issue is whether there should be a separate loan threshold for primary and general elections or one loan threshold for a campaign. At a minimum, she believed that candidates could be advised that whatever loan balance they had for a prior election should not affect their ability to have a loan balance for the next round of elections. Staff cannot yet advise them whether they can have $100,000 each for the primary and general elections.

Ms. Menchaca questioned whether staff should advise candidates not to aggregate accounts for other offices.

Chairman Getman responded that she did not think staff should.

Commissioner Swanson stated that she was leaning toward having one $100,000 limit for the entire campaign, including both the primary and general elections.

Chairman Getman noted that the Commission would be providing a definition of "campaign" by default as meaning the course of an election cycle, and that staff should research to determine whether that would become a problem with other regulations.

Chairman Getman stated that if the Commission decides to have one $100,000 limit for the entire campaign, it would resolve what to do with loans that were outstanding on January 2, 2001 because those would all be for a prior election and would not count toward the next election.

Commissioner Downey disagreed, noting that it depended on when the campaign began.

Chairman Getman agreed with Commissioner Downey. She stated that if the loan was for a prior election it would now count toward the loan limit for the upcoming election, which would be consistent with all other Commission interpretations of Proposition 34 so far. If the loan was taken out prior to January 1, 2001, for a campaign for the next upcoming election, she questioned whether it should be considered toward the $100,000 balance.

Commissoner Downey stated that he would be inclined to consider it, making the statute retroactive in that sense. He did not support holding the candidate in violation if the candidate had $150,000 in loans on January 2, 2001.

Chairman Getman clarified that as of January 1, 2001, candidates would be limited to an outstanding loan balance of $100,000 for any post-January 1, 2001 election. She questioned whether there are any candidates who currently have more than a $100,000 loan balance for an upcoming election.

Ms. Menchaca responded that staff has an advice letter prohibiting such an interpretation.

Mr. Wallace stated that if there were candidates with outstanding balances in excess of $100,000, they would not be able to loan any additional monies to their campaign, and questioned whether they would be in violation of the statute.

Commissioner Downey stated that it should not be considered a violation.

Chairman Getman agreed, but noted that they would be limited to the $100,000 outstanding balance.

Ms. Menchaca suggested that the regulation could be clarified in subsection (c).

Commissioner Downey suggested that if there are candidates with balances over $100,000, those monies were probably meant to be used to pay expenses from a previous election and not to fund the next election.

Ms. Menchaca suggested that this regulation be brought back to the Commission as a second pre-notice discussion.

Chairman Getman agreed.

The Commission adjourned for a break at 3:35 p.m.

The Commission reconvened at 4:15 p.m.

Item #11. Proposition 208 Regulations: Advertising Disclosure (§§ 84501-84510) - Pre-Notice Discussion of Proposed Regulations 18450.1-18450.5 and Possible Amendment of Regulation 18402.

Staff Counsel Jody Feldman presented the staff memorandum.

Chairman Getman asked whether staff believed that the drafters would not have intended disclosure of a single large contributor.

Ms. Feldman noted that the language of the statutes refers to any "committee."

Chairman Getman responded that the proposed regulation excludes major donor committees and independent expenditure committees.

Ms. Wardlow explained that the statute provides that a person by themselves could be an independent expenditure committee, not a recipient committee nor a contributor. That person would be subject to the regulations on independent expenditures but not to the statutes that apply to contributors.

Chairman Getman explained that there was a bipartisan commission studying internet issues and that she was reluctant to address those issues in a regulation at this time.

Mr. Wallace stated that, under the advertising disclosure rules of Propositions 105 and 208, staff found one advice letter involving issues related to web sites. He believed that the federal law included web sites.

Ms. Feldman pointed out that currently there was no separate regulation of web sites or internet commerce, however there is a great deal of discussion in that direction. In response to a question, she stated that e-mails are not currently included in any regulation.

She noted, however, that there was great deal of campaign activity conducted through e-mail in the past year.

Chairman Getman suggested that the Commission have a fuller discussion on the issue at the next prenotice hearing. She noted that e-mail and web sites are a very low cost way to distribute political messages and are supported by campaign reform advocates. She was reluctant to make it more burdensome, and suggested that the Commission study the restrictions and who it would apply to. She warned that the federal commission had started to regulate people working on pure political speech from their computers at home, subjecting them to nightmarish regulations.

Ms. Feldman explained that decision point 1 deals with how to define "advertisement." Staff presented two options for the Commission's consideration. Each option included options for threshold numbers.

Ms. Feldman explained that the first option consisted of a list of specific activities to be regulated. Decision points "1a" and "1b" gave the Commission the option of including in the definition of "advertisement" mass mailings and telephone communications directed to levels of 200, 500 or 1,000 people.

Commissioner Downey noted that the overall policy concern of the statute is to allow for an informed electorate, and suggested 200 people would meet that criteria.

Chairman Getman noted that the statute encompasses not just committees, but also persons.

In response to a question, Ms. Feldman stated that, because of the $50,000 threshold specified in the statutes, staff believed that disclosures under this regulation were limited to committees.

Mr. Wallace stated that the disclosure is limited to the $50,000 contributors, and any entity that is so small that it does not have $50,000 contributors will not have to make those disclosures.

Commissioner Swanson noted that telephone messages and direct mail items often reach more than one person at a single phone number or single address. She suggested changing "persons" to "persons and/or households." She also noted that posters or yard signs are often "homespun" and she questioned whether they should be considered advertising. She agreed that billboards or very large signs should be considered advertising.

Chairman Getman noted that the sign would be placed by a committee that has donors of $50,000.

Ms. Feldman agreed that it would probably be unconstitutional to require disclosure on somebody's homemade yard sign, but that the disclosures would only be required for those committees with contributors of $50,000 or more.

Commissioner Knox asked whether the threshold affects § 84504(c). He also noted that the draft regulation did not refer to the fact that an advertisement has to be paid for by a person or committee.

Ms. Menchaca responded that the regulation requires disclosure of the two major donors at that particular time, while the requirements of § 84504 would apply only in the context of advertisements that require the disclosure of those $50,000 donors.

Commissioner Knox stated that § 85401(a) includes as part of the definition of advertisement, "authorized and paid for by a person or committee…" He noted that the regulation did not include the language, "paid for."

Ms. Feldman responded that it was not intentionally left out and could be included in the regulation.

Ms. Menchaca stated that the substantive provisions are included in other regulations, including regulation 18450.4. Decision point 4 of that proposed regulation includes language linking the committee that authorized and paid for the advertisement with the disclosure statement. She asked the Commission whether it was helpful to provide the definitions first in the proposed regulations.

Ms. Menchaca asked the Commission whether they preferred a regulation that is more like a laundry list or more like a definition of "advertisement" that embodies general concepts.

Chairman Getman stated that the advantage of a "laundry list" is that it is easier to provide advice, but noted that it is not all inclusive and could be difficult to defend in court.

Ms. Menchaca responded that neither option would necessarily resolve that issue. She noted that § 84501(b) expressly contains certain exceptions to the term "advertisement" and that staff has expanded on that in the proposed regulations, emphasizing what is conveniently or not conveniently displayed. She suggested that the Commission consider whether to include exceptions that go beyond those included in the statute.

Ms. Feldman noted that a number of the exceptions were taken from the federal regulations. She presumed that wearing apparel was excepted because wearing apparel is purchased, and therefore the advertising is paid for by the purchaser. She explained that water towers were not included because there are so few in California.

Chairman Getman questioned whether a large message mown into the side of a hill would require a disclaimer.

Ms. Feldman responded that it would not because it would be impractical to put the disclosure in the lawn. For that same reason, skywriters would not be required to disclose. A banner plane would have to disclose under proposed option 1.

In response to a question, Ms. Feldman stated that the statutes are for the benefit of the public, and that disclosures may be impractical when the public cannot see the disclosure.

Chairman Getman stated that it would be more difficult to craft regulations that try to determine whether a disclosure can be seen than to craft a regulation that would require disclosure even if it cannot be seen.

In response to a question, Ms. Feldman explained that the $50,000 contribution applies to contributions received by a committee from a specific contributor.

Chairman Getman explained that a $5 advertisment would have to have disclosure on it if the committee paying for the advertisement received at least one contribution of $50,000 or more.

Ms. Feldman explained that other regulations address the size of the advertisement.

Commissioner Downey supported the "laundry list" approach because, even though it was not ideal, it was the best approach.

Ms. Feldman stated that staff recommended option 1, the "laundry list" approach, because it is more specific and subsection (a)(7) would capture the more creative types of advertising.

Chairman Getman stated that, since the statute specifically excludes certain things, it meant to include many other things. She cautioned that including a "laundry list" would require including many other things. Concern about including disclosure on those forms of advertising where it would be impractical to include that disclosure could be addressed by advising that, if it is an advertisement it must include disclosure unless it is impractical to do so.

Colleen McAndrews, from Bell, McAndrews, Hiltachk and Davidian urged the Commission to study the overall impact of the regulations. She pointed out that the $50,000 donors to committees change and that changing the yard signs and bumper stickers would not be practical and would not further the goal of disclosure because, in those cases, the disclosure would probably not be noticeable. She explained that broadcast media and direct mail could be changed pretty easily, but the small campaign paraphernalia would be difficult to change.

Mr. Wallace commented that the statutory language included, "a campaign button smaller than ten inches in diameter is exempt." Staff perceived it to mean that something larger than that should include the disclosure.

Chairman Getman agreed that it would have to include disclosure, but questioned whether the disclosure needed to be changed when the $50,000 contributors changed. She noted that the most concern should be centered around the television, newspaper, and billboards, and a "laundry list" of minutia should be avoided.

Commissioner Downey agreed that the regulation should be more general.

Chairman Getman requested that staff develop a third option, with presumptive language indicating that the advertisement must be visible to the community.

Commissioner Swanson stated that it should apply to massive slate mailers or massive telephone communications.

Chairman Getman noted that the Alcoholic Beverage Control (ABC) laws and the retail industry deal with statutes involving advertisements for alcoholic beverages and promotional items. She suggested that staff explore their regulations for guidance.

Ms. Menchaca stated that staff would work with Enforcement Division to develop another option.

Chairman Getman stated that a regulation should be developed that could be defended in court.

Mr. Wallace suggested that a legislative amendment might be explored.

In response to a question, Ms. Feldman stated that there was little guidance regarding the intent of the drafters.

Chairman Getman suggested that staff develop a restriction that the advertisement reach at least 200 people.

Commissioner Knox agreed, and suggested language saying, "intended," or "reasonably calculated to reach or be seen by…" He noted that personal apparel could be excluded, but if 1,000 t-shirts were manufactured the Commission might want the disclosure on them.

Chairman Getman noted that "advertisements" and "promotional items" are not the same in other areas of the law, and that promotional items might be excluded.

Commissioner Knox questioned why t-shirts, as a promotional item, should be excluded when, in fact, a $50,000 donation may have been made to a committee producing the shirts and the shirts urge people to vote a certain way. He noted that it would be difficult to determine when the disclosure in those types of cases should be made.

Ms. Menchaca explained that option 2 begins to look at that concept, and suggested that staff explore who would be considered to be the public in this context. She noted that staff should explore the issue of distribution and dissemination.

Ms. Feldman asked whether the Commission was concerned about whether the promotional item was purchased or given to the person at no charge.

Ben Davidian, of Bell, McAndrews, Hiltack and Davidian, gave a brief overview of past Commission meeting discussions regarding this issue. He suggested that the Commission would have great difficulty with a "laundry list" approach in the regulation.

Ms. Menchaca noted that § 84501 provides that the Commission will develop regulations for advertisement exceptions.

In response to a question, Ms. Menchaca stated that the only indication of the intent of the advertising provision of Proposition 208 in the sample ballot was the statement, "To meet the citizens' right to know the sources of campaign contributions, expenditures and political advertising."

Chairman Getman noted that it would support the interpretation that disclosure should be required if the advertisement is going to be broadcast to a group and should involve a message that people can see. That disclosure would not be to punish the committees, but rather to provide disclosure information that can be seen on materials that will be disseminated to the public, thereby providing some limiting principles.

Ms. Menchaca stated that staff could draft language that would be more like option 2, but less of a "laundry list." It would focus on the distribution of the message to the public.

Commissioner Downey noted that § 84501(b) almost directs the Commission to make a "laundry list."

Chairman Getman noted that § 84506 discusses a broadcast or mass mailing advertisement, and questioned whether that too might be a limiting principle.

Mr. Wallace responded that § 84506 uses a lot of terminology not used in other sections, and that it would be hard to use that language to limit the other provisions.

Ms. Menchaca stated that staff was trying to write a regulation that considers all of the different sections in terms of the definition of advertisement.

Ms. Feldman noted that staff defined "broadcast" and "mass mailing advertisement" within regulation 18450.1 as a subset of advertisement in general.

Chairman Getman suggested that staff draft language that is more general.

Ms. Feldman stated that decision point 2 related to § 84501(b).

Chairman Getman stated that she agreed with staff that the sentence in question should be read to refer to an organization other than a political party.

Commissioners Knox, Downey and Swanson agreed.

Ms. Feldman stated that decision point 4 addressed § 18450.2. The regulation addresses whether the $50,000 threshold found in §§ 84503 and 84504 is imported into § 84506.

Ms. Menchaca asked whether the Commission supported applying the concept of cumulative contributions throughout the statutory scheme. Only one of the sections actually refers to cumulative contributions but the provisions would explain how to qualify as a $50,000 donor.

Commissioner Downey stated that the proposed regulation appeared inconsistent with § 84502 because the statute reads that the cumulative contributions should be counted beginning the first day the statement of organization is filed, while the regulation puts a time limit on it.

Ms. Feldman agreed, but noted that contributions may have been made a number of years ago and the people who gave the money are not necessarily the people who need to be disclosed to the public.

Chairman Getman suggested that the time limit should be done by legislative action because the statute was clear.

Mr. Wallace stated that the Commission has, on occasion, interpreted statutes to fulfill the purported intent to avoid absurd results, and that the courts have upheld those interpretations. He believed that the interpretive language is consistent with the overall intent of the statutes, but agreed that the courts might not support it.

Chairman Getman responded that, in this case, it might be better to pursue a legislative change.

Commissioner Knox agreed that the language of the statute is the first guide to the intent.

Ms. Feldman explained that § 84506, dealing with independent expenditures, has no thresholds, but does include the language, "consistent with any disclosures required." Staff believed that language justified the importation of the $50,000 threshold from §§ 84503 and 84504.

Commissioner Downey stated that it was important to inform the electorate, and that, since the language of the statute indicates, "two largest contributors," then the regulation should include the two largest contributors regardless of the amount contributed.

Ms. Feldman pointed out that union members might all give the same amount.

Commissioner Downey responded that those circumstances would require a regulation.

Chairman Getman noted that the language also reads, "consistent with any disclosures required by § 84503 and 84504," when there would be no disclosures unless the person contributed $50,000.

Commissioner Downey asked whether it would be inconsistent with the statute to disclose contributors who contributed less than $50,000.

Chairman Getman responded that §§ 84503 and 84504 provide that it would not be disclosed.

Commissioner Downey stated that the statute outlines when disclosure is required, but questioned whether "overdisclosure" would be allowed.

Mr. Olson stated that, in previous Commission discussions, Tony Miller, a principal drafter of Proposition 208, stated that it was his view that the $50,000 threshold was intentionally incorporated into this section. Additionally, he believed that FPPC staff gave verbal advice indicating that threshold was incorporated.

Commissioner Knox stated that he supported importing the $50,000 threshold into § 84506.

Commissioner Swanson and Chairman Getman agreed with Commissioner Knox.

Commissioner Downey did not object to importing the $50,000 threshold into § 84506.

Chairman Getman suggested that legislative clarification be pursued.

Ms. Menchaca explained another related issue (decision point 6) dealing with identification of the economic or other special interest in the disclosure statement. Staff recommended amending an existing regulation delineating how to include the name of a committee in the Statement of Organization. It advises people that there is a new requirement and that amendments need to identify the economic or other special interest. Names would need to be determined on a case-by-case basis. Alternately, staff could attempt to determine what is meant by, "an economic or other special interest," the type of industry, and how to determine the name of the industry that is to be included in the statement of organization.

Chairman Getman noted that this is a difficult issue because committee names can be deceiving, and people feel that current disclosure laws are not working because the committee names do not reveal who is really behind the committee. Enforcement of the regulation would be difficult, but she was not opposed to trying it.

Ms. Feldman suggested that option 3 tries to make the committee name relate to the ballot measure that is being funded and may be the type of approach the Chairman was proposing.

Ms. Menchaca noted that the Commission may prefer to amend regulation 18402, and then define the terms of the regulation. Alternately, the Commission could define it in new regulation 18450.3. She requested input from the regulated community.

Chairman Getman suggested that the Commission keep the information provided by staff and look for more public input on the issue.

Ms. Feldman explained that some public comments had requested that the regulation require that advertising that no longer has accurate information be pulled at a certain time. Staff drafted language to address the issue, but there were issues regarding prior restraint and free speech that the Commission should consider.

Chairman Getman suggested that a tangible item that was accurate at the time that it was produced should not be removed from circulation. Broadcast media, or something that is capable of change, should be updated. She noted that accurate broadcast advertising should be a priority, especially since substantial money is contributed near the end of the election to fund a broadcast campaign, and those donors must be accurately identified.

Ms. Menchaca questioned whether, if this is not done, the statutes mandate that the advertising be pulled. Staff did not believe that the Commission had statutory authority for that type of action. If the Commission chose to pursue that remedy, she suggested that legislative action may be needed. Staff was hesitant to add a new violation where there were already two specific provisions that provide for sanctions.

Chairman Getman stated that there would be a violation if an advertisement capable of being changed is not changed. However, the Commission did not have the authority to stop the advertisement from being run when the violation is identified. She noted that it might be possible to ask the court to issue an injunction in that scenario.

Commissioner Knox stated that a regulation requiring that an advertisement be accurate would have to allow for a little "slippage."

Chairman Getman suggested that there could be a special rule for television ads because they can be changed with several days notice.

Ms. Feldman supported the idea of changing the proposed regulations to reflect the difference between changeable advertising versus tangible advertising.

Commissioner Swanson asked whether vendors who prepare advertising could be required to be aware of the law and have appropriate safeguards in the advertising to avoid being in violation of the law.

Chairman Getman suggested that staff explore disseminating the information.

Mr. Olson commented that § 84504, as interpreted by the Commission, applies to recipient committees including the political parties. Since political parties typically receive more than $50,000 from any one donor, he concluded that, "the (name of political party) and (name of contributor)" would have to be included in the disclosure. He suggested restricting the definition of "committee" to not just "recipient committee" but a specific type of recipient committee (a primarily formed committee). This would not be inconsistent with the statute, and would eliminate the problems for the political parties. He did not know that there were any other "general purpose" type committees that receive $50,000 contributions and then support or oppose ballot measures. If it remains "recipient committees," the major political parties in the state would be renamed under this rule.

In response to a question, Mr. Olson stated that "recipient committee" is defined in § 82013(a), and the political parties would be considered recipient committees under that definition. He explained "primarily formed" and "general purpose" committees.

Commissioner Downey pointed out that subdivision (a) refers to "any committee."

Mr. Olson responded that it is likely that this regulation will end up in litigation, and that it would help if it were narrowed.

Ms. Menchaca explained that decision point 5 included the language Mr. Olson referred to, and that the question should be addressed at the adoption stage of the process. Now that staff have received some guidance from the Commission, staff may be able to narrow that part of the regulation.

Item #12. *In re Fontana*.

This report was taken under submission by the Commission.

Items #14, #15, #16, #17, #18, #19, #20, #21, #22.

Commissioner Swanson motioned that the following items be approved on the consent calendar:

Item #14. ***In the Matter of Royal T Management, Inc. and James William Ganson, FPPC No. 2000/84.*** (two counts).
Item #15. ***In the Matter of the California Autobody Repair PAC; John Sutherland, Treasurer, FPPC No. 01/243.*** (seven counts).

Item #16. ***In the Matter of Communication Workers of America, District 9 Political Education Committee, Anthony Bixler, and William Quirk, FPPC No. 99/642.*** (14 counts).

Item #17. ***In the Matter of the Greater San Diego Chamber of Commerce Foundation, FPPC No. 98/265.*** (1 count).

Item #18. ***In the Matter of Governmental Impact, and Jim Dantona, FPPC No. 00/733****. (2 counts).*

Item #19. ***In the Matter of Home Depot USA, Inc., FPPC No. 01/179.*** (2 counts).

Item #20. ***In the Matter of Leo Bleier, FPPC No. 2001/266.*** (1 count).

Item #21. ***In the Matter of Sharon Gowan, FPPC No. 2001/264.*** (1 count).

Item #22. ***In the Matter of Peter Green, Committee to Re-elect Peter Green, FPPC No. 2001/245*****.** (1 count).

Commissioner Knox abstained from item #19.

There being no objection, items #14, #15, #16, #17, #18, #19, #20, #21, and #22 were approved on consent with Commissioner Knox abstaining from item #19.

Item #23. Executive Director's Report.

Acting Executive Director Mark Krausse requested the Commission's approval for the $173,000 cut made in the current budget pursuant to the Governor's budget, and for submission of budget change proposals for 3%, 5%, and 10% projected cuts for next fiscal year should they be necessary.

There was no objection from the Commissioners.

Chairman Getman motioned that the Commission's proposed 2002/03 budget be approved.

Commissioner Downey seconded the motion.

Commissioner Swanson noted that general expenses for the current fiscal year were decreased for next fiscal year.

Mr. Krausse explained that those budget cuts were required in order to meet the reduction requirements of the Governor's budget.

In response to a question, Chairman Getman stated that proposed cuts included cancelling some contracts for outside maintenance. In-house staff would be required to perform the maintenance. She pointed out that this would tie up IT staff schedules, but that it could be done.

In response to a question, Mr. Krausse explained that printing costs for 2002/03 are anticipated to be $47,500, compared to $29,200 for the 2001/02 fiscal year, because the higher amount includes the acquisition of two color copiers that will allow staff to make

color copies rather than sending documents out for color copying. Those copiers were acquired with Public Education Unit budget monies at the end of the 2000/01 fiscal year, and the 2002/03 budget amounts include increased maintenance costs.

Commissioner Swanson seconded Commissioner Downey's motion.

There being no objection, the motion carried.

Items #24 and #25.

The following items were taken under submission:

Item #24. Legislative Report
Item #25. Litigation Report.

Chairman Getman noted that SB 34 was signed into law by the Governor.

The Commission adjourned to closed session at 5:18 p.m.

The public session reconvened at 6:05 p.m.

The meeting adjourned at 6:05 p.m.

Dated: October 11, 2001

Respectfully submitted,

_____
Sandra A. Johnson
Executive Secretary

Approved by:

_____
Chairman Getman